IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No.

ARIZONA PUBLIC SERVICE COMPANY, TUCSON GAS AND ELECTRIC COMPANY, NEVADA POWER COMPANY, AND SOUTHERN CALIFORNIA EDISON COMPANY,
Petitioners

v.

ARIZONA POWER POOLING ASSOCIATION, an Arizona corporation, ARIZONA POWER AUTHORITY, an agency of the State of Arizona, INTERMOUNTAIN CONSUMER POWER ASSOCIATION, a Utah corporation, and BOUNTIFUL, UTAH, a municipal corporation.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Arizona Public Service Company, Tucson Gas and Electric Company, Nevada Power Company and Southern California Edison Company hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The initial opinion of the court of appeals (App. A, *infra*, pp. 19-31) and its opinion on petition for rehearing (App. C, *infra*, pp. 33-37) are not yet reported. The opinion of the district court (App. D, *infra*, pp. 38-41) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 24, 1975. Timely petitions for rehearing were denied, by order of the court of appeals, on December 17, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Congress, in enacting the Colorado River Basin Project Act, made the preference provisions of the Reclamation Project Act of 1939 applicable to thermal power which the Secretary of Interior purchased the future right to receive in order to supply pumping power to the Central Arizona Project.

2. Whether the Secretary of Interior's selection and implementation of "the most feasible plan" for satisfying Central Arizona Project power requirements was a decision "committed to agency discretion by law," and not subject to judicial review.

STATUTES INVOLVED

Pertinent provisions of the Colorado River Basin Project Act, 43 U.S.C. § 1501, *et seq.*, of the Reclamation Project Act of 1939, 43 U.S.C. § 387, *et seq.*, and of the Administrative Procedure Act, 5 U.S.C. §§ 700-706, are set forth in App. E, *infra*.

STATEMENT

This case now concerns the propriety of certain judicially-imposed limitations on the authority conferred upon the Secretary of the Interior by the Colorado River Basin Project Act (hereinafter the "Act"), 43 U.S.C. § 1501, *et seq.*, to acquire the power necessary for the operation of the Central Arizona Project (hereinafter "CAP"), which was created by the Act to furnish "ir-

rigation water and municipal water supplies to water-deficient areas of Arizona and western New Mexico," 43 U.S.C. § 1521(a). Under the Act, which became law on September 30, 1968, the Secretary was granted one year in which to study possible means of acquiring the power needed to operate CAP pumping facilities, and to submit to Congress "the most feasible plan" for the acquisition of such power. 43 U.S.C. §§ 1523(a), 1523(c).[1]

Under the plan eventually developed during that one-year period, the Secretary, acting pursuant to the authority conferred upon him by 43 U.S.C. § 1523(b), entered into a series of agreements with various utilities that had been planning the construction of a thermal generating plant known as the Navajo Project. Under these agreements, the Secretary acquired the right to receive 24.3% of the Navajo Project's power output for CAP purposes. Because the Navajo plant was scheduled to commence operations prior to the time when the Secretary would require power for the CAP, however, there existed some "interim power," which was committed, as part of the initial participation agreements, to the other utilities participating in the Navajo Project, and to Southern California Edison Co., from whom the United States needed access to and consequent modification of transmission facilities.

The Secretary submitted his comprehensive electric energy acquisition plan to the Congress within the time period prescribed, and the Congress appropriated funds for its initial implementation. Thereafter, Congress has continued to appropriate the funds necessary to carry out the Secretary's plan, and to

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[1] In conducting this study, and in formulating his plan, the Secretary was specifically directed to consider (1) "the construction and operation of hydroelectric generating and transmission facilities," (2) "the purchase of electrical energy," (3) "the purchase of entitlement to electrical plant capacity," as well as (4) "any combination thereof." 43 U.S.C. § 1523(a).

fulfill the obligations of the United States under the agreement among the Navajo Project participants.[2]

Arizona Power Pooling Association instituted this action initially in the United States District Court for the District of Columbia against the Secretary and the Commissioner of the Bureau of Reclamation, alleging that the Secretary's disposition of the "interim power" had been negotiated and implemented in contravention of the preference provisions of § 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(c), which was applicable to the Colorado River Basin Project Act by reason of 43 U.S.C. § 1554. The case was transferred to the United States District Court for the District of Arizona on February 29, 1972.

Upon transfer, the Association filed an Amended Complaint naming as additional parties defendant all the investor-owned utilities who had received portions of the "interim power" as a result of the participation agreements.[3] By leave of court, Arizona Power Authority, Intermountain Consumer Power Association, and Bountiful, Utah intervened as parties plaintiff. Upon motion of the defendants, the district court dismissed the action, ruling that the Congressional mandate to the Secretary to develop the "most feasible plan" for the acquisition of CAP energy needs committed the selection of the plan eventually adopted to the discretion of the Secretary, that the exercise of this discretion was not reviewable under the Administrative Procedure Act, and that the Secretary's choice of a plan had been approved and confirmed by subsequent Congressional action.

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[2] Cf. P.L. 91-144, 83 Stat. 323 (1970 Appropriations); P.L. 91-439, 84 Stat. 890 (1971 Appropriations); P.L. 92-134, 85 Stat. 364 (1972 Appropriations); P.L. 92-405, 86 Stat. 621 (1973 Appropriations); P.L. 93-97, 87 Stat. 318 (1974 Appropriations).

[3] Two of the recipients of the "interim power", *i.e.*, the Salt River Project and the City of Los Angeles, were not made parties, presumably because they are "preference" customers.

An appeal was taken from this determination and, in its initial opinion of September 24, 1975, the court of appeals reversed and remanded, stating its conclusions in the following passage:

> First, we hold that the preference clause does apply to the sales of interim thermal power at issue, and that merely by appropriating funds for the Central Arizona Project, Congress cannot be deemed to have authorized any contravention of the preference clause so as to render the Secretary's actions unreviewable. Furthermore, we find that the Secretary's decision regarding which entities would be allowed to purchase interim power from the project was not one "committed to agency discretion" within the meaning of the Administrative Procedure Act, and was therefore judicially reviewable. (App. A, *infra*, p. 21).

In its opinion, which explained the bases for these conclusions, the court of appeals made the express assumption that: ". . . it is undisputed that the Secretary refused to offer the Association the opportunity to become a purchaser [of the interim power],". (App. A, *infra*, p. 23).

The court discerned in the district court's decision a tacit assumption that Congress had made the preference clause applicable to the disposition by the Secretary of electric power produced by thermal generation. Addressing itself to this question, the court ruled that: "[I]n drafting the CAP portion of the Act, however, Congress authorized federal participation in thermal electric projects, and clearly made all sales of any excess (including interim) power from such a project subject to federal reclamation laws, including the preference clause," reasoning that this result was dictated by the ". . . clear language of the Act. . . ." (App. A, *infra*, p. 26).

The court then ruled that there was insufficient basis for concluding that Congress was aware that the opportunity to acquire the interim power had not been extended to preference custom-

ers and, accordingly, subsequent Congressional appropriation of funds for the CAP could not be construed as approving this perceived violation of the preference clause.

On the issue of the availability of judicial review, the court of appeals characterized the Secretary's decision as entailing the selection of purchasers for the interim power. While the court recognized that the Congressional mandate to the Secretary: "to devise 'the most feasible plan' for obtaining pumping power for the Central Arizona Project would seem to endow him with almost unlimited authority in orchestrating all phases of the project." (App. A, *infra*, p. 29), it found that the breadth of this discretion had been limited "by making his actions subject to the Federal reclamation laws," including the preference clause. (App. A, *infra*, p. 29). Finally, the court recognized that the preference clause itself provided that it was inapplicable where the Secretary determined that extension of the preference would impair the efficiency of the reclamation project concerned. Accordingly, the case was remanded for the district court "to determine whether the Secretary abused the limitations on his discretion by deciding that, because of these considerations, a disposition of the interim power to appellant and other excluded preference customers would have impaired the efficiency of the Central Arizona Project for irrigation purposes." (App. A, *infra*, pp. 30-31).

Timely petitions for rehearing of this decision were filed and, on December 17, 1975, a supplemental *per curiam* opinion was issued, clarifying the court's earlier opinion. Initially, the court noted that its prior statement to the effect that the interim power had never been offered to preference customers should have been cast in terms of an assumption in light of the litigation's procedural posture. The court then noted that the district court had apparently accepted the Secretary's contention that the disposition of the interim power was part of his selection of the "most feasi-

ble plan" for satisfying CAP energy requirements. Stating that the propriety of that determination was the sole issue to be resolved on appeal, the court of appeals ruled:

> We hold that the direction to the Secretary to recommend "the most feasible plan" for acquiring power does not comprehend the right to sell excess power in a manner that is in conflict with the reclamation acts even though the Secretary may seek to denominate such sales as part of "the most feasible plan" which he has otherwise authority to put into effect. (App. C, *infra*, p. 35).

The court then reiterated its prior statements concerning the effect of subsequent Congressional appropriations, the reviewability of the Secretary's decision, and the issues to be determined upon remand. On the basis of this supplemental opinion, the petitions for rehearing were denied. (App. B, *infra*, p. 32).

REASONS FOR GRANTING THE WRIT

The Colorado River Basin Project Act represented the culmination of almost a decade of effort to secure authorization for the Central Arizona Project, which is intended to alleviate the critical problem of water shortages which has historically plagued certain portions of the southwestern United States. Not the least of the issues which retarded prompt passage of this legislation were those concerning the sources of power for the Central Arizona Project, and the potential effect of the power preference provisions of the reclamation laws. In its final form, the Act fashioned a delicate compromise which eschewed rigid restrictions on the manner in which the Project would be accomplished and conferred on the Secretary of the Interior broad discretion to develop and implement the "most feasible plan" for securing the Project's power requirements.

In its decision, the court of appeals ignored both the precise terms and the spirit of the compromise which the Act effected. In holding that the termal power entitlement, which the Secretary purchased from the Navajo Project participants, was subject to the preference clause, the court ignored the plain and unequivocal language of the very statutory provision which the court

relied on as making the preference applicable in the first instance. In similar fashion, the court found a basis for review of the Secretary's actions only by mischaracterizing the nature of the transaction and by discerning a limit on the Secretary's authority which neither the Act itself, its legislative history, nor its purpose will support.

The Central Arizona Project is of critical concern to the future development of the Southwest. The areas to be served by the Project have historically suffered from shortages of water supplies, and the continued quality of life for persons who presently reside in these areas, as well as the prospects for future growth, depend in large measure on the extent to which the project meets its intended goals.

The utilities which were the recipients of the "interim power" in issue are the major sources of electric energy for metropolitan areas in the Southwest and Southern California. In reliance upon the availability of this power, these utilities have to varying degrees not pursued other means for securing the power needed to meet the increasing demands of the areas they serve. There is now neither the necessary planning and construction lead time nor existing or sufficiently near-complete facilities to compensate for the withdrawal of this "interim power." In terms of the availability of energy supplies to serve existing population areas in the Southwest, loss of the interim power would create the potential for chaos.

By disregarding the plain language of the Act in order to find a basis for judicial review of the Secretary's method for securing power for the Project, thereby creating the possibility that the interim power will be withdrawn from petitioners, the court of appeals' opinion has significant ramifications for the Central Arizona Project, and for the availability of energy to serve the needs of significant portions of the southwestern United States. At the very least, the court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court. More importantly, the contrived reasoning employed is so

inconsistent with the rule enunciated in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971) and other decisions of this Court as to warrant this Court's immediate consideration.

I.

IN DETERMINING THAT THE PREFERENCE CLAUSE WAS APPLICABLE TO THERMAL POWER PURCHASED BY THE SECRETARY, THE COURT OF APPEALS IGNORED THE EXPLICIT LANGUAGE OF THE COLORADO RIVER BASIN PROJECT ACT.

As noted earlier, the plan selected by the Secretary for the acquisition of CAP power needs entailed the purchase of the right to receive a portion of the energy produced by a thermal power plant operated by non-Federal interests, a method for acquiring power which had been specifically authorized by 43 U.S.C. § 1523(b). The result reached by the court of appeals was premised upon its determination that the portion of this thermal power "entitlement" which constituted "interim power" was subject, by reason of 43 U.S.C. § 1554, to the restrictions of the preference clause of § 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(c). Implicit in this conclusion is the determination that Congress made the preference applicable to the Federal *thermal* power entitlement at all – a determination which can only be made by disregarding the express language of the Act.

The past history of Federal power policy has been marked by a special Congressional concern for the production of hydroelectric energy, which has manifested itself in disparate regulatory treatment of hydroelectric and thermal generation. *Cf., e.g., Chemehuevi Tribe of Indians v. Federal Power Commission*, U.S. , 43 L.Ed.2d 279, 95 S.Ct. 1066 (1975); *Federal Power Commission v. Union Electric Co.*, 381 U.S. 90 (1965); *Montana Power Co. v. Federal Power Commission*, 298 F.2d 335 (D.C. Cir.

1962)[4] . The legislative background which spawned the Colorado River Basin Project Act was no exception.

When the Central Arizona Project was first conceived, and in all of the earlier versions of the Act introduced into previous Congresses, it was contemplated that the pattern of past Federal reclamation laws would be followed and that hydroelectric energy would be employed for pumping purposes.[5] Conservationists' opposition to the use of such power, however, defeated the Central Arizona Project in the 89th Congress, and forced the Secretary to provide an alternative means for providing electric energy.

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[4] This dichotomy is partially reflected in the fact that throughout the years, in practically every instance in which Congress has enacted a preference clause, it has been in the context of hydroelectric generation. *Cf., e.g.*, the Reclamation Act of 1906, 43 U.S.C. § 522, the Raker Act of 1913, P.L. 63-41, 38 Stat. 242; the Federal Water Power Act of 1920, 16 U.S.C. § 800; the Salt River Project Act of 1922, 43 U.S.C. § 598; the Boulder Canyon Project Act, 43 U.S.C. § 617d(c); the Tennessee Valley Authority Act, 16 U.S.C. §§ 831i,j; the Rural Electrification Act of 1936, 7 U.S.C. § 904; the Bonneville Project Act, 16 U.S.C. § 832c; the Fort Peck Project Act, 16 U.S.C. § 833c; the Reclamation Project Act of 1939, 43 U.S.C. § 485h(c); the Water Conservation and Utilization Act of 1940, 16 U.S.C. § 590z-7; the Flood Control Act of 1944, 16 U.S.C. § 825s; the Eklutna Project Act of 1950, P.L. 81-628, 64 Stat. 382; the Falcon Dam Act of 1954, P.L. 83-406, 68 Stat. 255; the Atomic Energy Act of 1954, 42 U.S.C. § 2064; the Niagara Project Act, 16 U.S.C. § 836(b)(1); the Colorado River Storage Project Act, 43 U.S.C. § 620c.

[5] *Cf., e.g.*, S. Rep. No. 408, 90th Cong., 1st Sess. (1967) 21-25; *Hearings Before the Subcommittee on Water and Power Resources of the Senate Committee on Interior and Insular Affairs*, 90th Cong., 1st Sess., at 136 et seq. (1967) [hereinafter cited as *Senate CAP Hearings*]; *Hearings Before the Subcommittee on Irrigation and Reclamation of the House Committee on Interior and Insular Affairs*, 90th Cong., 1st Sess., at 76 et seq. (1967) [hereinafter cited as *House CAP Hearings*].

Accordingly, the Administration version of the Act transmitted to the 90th Congress contemplated a thermal electric generation facility owned by non-Federal interests as the source of pumping power, and only briefly mentioned hydroelectric generation.[6] This proposal, however, began rather than ended the controversy. An unusual alliance of conservationists and privately-owned utilities, who advocated thermal electric generation, was formed to oppose the beneficiaries of the Federal preference, *i.e.*, municipalities and REA cooperatives, who argued for continued use of hydroelectric generation to preserve their advantageous position.[7]

The ultimate result of the controversy was a compromise in the final version of the Act. Rather than itself specifying the source of energy for the CAP, Congress left it to the Secretary "to recommend the most feasible plan" based upon either "the *construction* and *operation* of hydroelectric generating and transmission facilities," or the "*purchase* of electrical energy," or the "*purchase* of entitlement to electrical plant capacity," 43 U.S.C. § 1523(a) (emphasis supplied). As the use of thermal power was a significant departure from past policies, the authorization was a cautious one. The United States was not to have a proprietary interest in thermal electric generating facilities themselves, but merely an entitlement to power from the plant. The legislative history of the Act reveals that the Congress which enacted it was acutely sensitive to the hydroelectric-thermal power controversy, and this sensitivity is reflected in the terms employed to define the mandate to the Secretary.

While the Act authorized the Secretary to *construct*, *operate* and maintain "hydroelectric power plants," 43 U.S.C. § 1521(a)(8), and directed him to consider "the *construction* and *operation* of *hydroelectric* generating and transmission facilities" in developing his energy acquisition plan, 43 U.S.C. § 1523(a), it permitted

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[6] See §§ 2(a)(8), 2(b) in *House CAP Hearings* at 15-16.

[7] *Cf.*, *e.g.*, *Senate CAP Hearings*, at 286-287, 320-322; *House CAP Hearings* at 679-681; 113 Cong. Rec. 21687-88.

only the *purchase* of, or the *purchase* of entitlement to, *thermal* power, 43 U.S.C. §§ 1523(a), (b). This distinction is mirrored in 43 U.S.C. § 1554, the provision which the court of appeals relied on as making the preference applicable to the interim power. By its very own terms, 43 U.S.C. § 1554 directed the Secretary to comply with Federal reclamation laws only in *"constructing, operating*, and *maintaining* the units of the project. . . ." (All emphasis supplied).

This use of parallel language in these critical sections of the Act cannot be overlooked, dismissed as inadvertent, or otherwise disregarded. While the court of appeals states that its conclusion is dictated by the "clear language of the Act", quite the opposite is true. *The reclamation laws, including the preference clause, were made applicable only to units of the CAP which the Secretary constructed, operated or maintained.* The only units which the Act authorized the Secretary to construct, operate or maintain were *hydroelectric* generating facilities.. *The Act did not authorize the Secretary to construct, operate or maintain any thermal power facilities*, but only to *purchase* thermal power. The precise terms of 43 U.S.C. § 1554 indicate that the preference provisions of the reclamation laws would apply only to hydroelectric facilities which the Secretary might choose to build and operate, and not to the thermal power entitlement acquired in the agreements with the Navajo Project participants.

II.

THE COURT OF APPEALS MISCHARACTERIZED THE NATURE OF THE SECRETARY'S DECISION IN ORDER TO FIND A BASIS FOR JUDICIAL REVIEW.

A. *The court erroneously treated the interim power transaction as the separate sale of power, rather than as part of its initial acquisition.*

The court of appeals' ruling that the appellants were entitled to judicial review of the manner of disposition of the interim power was founded upon a determination that "Congress . . . clearly made all sales of any excess (including interim) power from such a project subject to federal reclamation laws, including

the preference clause." (App. A, *infra*, p. 26). Quite obviously, this statement assumes that the interim power layoff is to be viewed as the *sale* of surplus power, rather than as part of the *acquisition* of power to meet CAP needs. Indeed, the court of appeals repeatedly refers, in conclusory fashion, to the decision of the Secretary as one "regarding which entities would be allowed to purchase interim power from the project. . . . " (App. A, *infra*, p. 21), without furnishing either factual or statutory support for the statement.

As the court of appeals itself noted, the secretary was given a broad range of discretion in selecting an energy acquisition plan for the CAP. If the Secretary elected to purchase thermal electric energy, or the entitlement to such energy, he was given authority to enter into the necessary agreements without further approval from Congress, 43 U.S.C. § 1523(c), and with only minimal statutory guidelines regarding the content of such agreements. *Id.*, 58 1523(b)(1)-(4). If the Secretary opted for hydroelectric generation, however, he was required to secure further approval from Congress. *Id.*, § 1523(c).

Acting pursuant to this mandate, the Secretary elected to purchase the right to receive power from the Navajo Project. This result was effectuated, not by means of a single, simple instrument, but by the execution of a series of complex and interrelated agreements, all effective as of September 30, 1969. In addition to the basic Participation Agreement and a Memorandum Transmission Agreement, agreements covering power coordination, arrangements for interconnected operations, the provision of rights-of-way over the lands of local Indian tribes and the disposition of the interim power entitlement were also executed. The intricate interrelationship of these agreements, coupled with their concurrent negotiation and execution, is the most cogent evidence that the interim power disposition was part and parcel of the initial acquisition of the thermal entitlement, rather than the separate sale of surplus energy.

Indeed, the court of appeals provides no factual support for its disagreement with the district court on this issue. Rather, the court of appeals' view of the transaction, as clarified in its supplemental opinion, derives from its unfounded belief that the Act precluded the Secretary from disposing of the interim power in *any* fashion in the *development or implementation* of his "most feasible plan." There is simply no provision of the Act, and the court of appeals identifies none, which mandates the separation of a single transaction into artificially discrete components, solely to find some basis of judicial review.

While 43 U.S.C. § 1523(b) authorized the Secretary to dispose of any power acquired through such agreements "intermittently" "[w]hen not required for the Central Arizona Project . . .", the legislative history of this particular provision makes it abundantly clear that the provision refers to power which exceeded the CAP's needs once it became operational, and not to the interim power entitlement.[8] Moreover, there is nothing in § 1523(b) which would make the preference applicable to the disposition of interim power, or limit the Secretary's discretion to select the "most feasible plan" in any fashion.

Nor does the section of the Act from which the preference derives, 43 U.S.C. § 1554, provide any support for this construction. The court of appeals states that the insertion of this provision in the Act had the effect of "making his [the Secretary's] actions subject to the federal reclamation laws," including the preference. (App. A, *infra*, p. 29). The obvious inference is that this section makes *all* of the Secretary's actions subject to the preference. Unfortunately, § 1554 hardly supports any such construction. By its very terms, this section applies only to certain specific activities which the Secretary was authorized to undertake, *i.e.*, the construction, operation, and maintenance of CAP units – activities which would be undertaken after, and as a consequence of, the Secretary's selection and implementation of a

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[8] *Senate CAP Hearings*, at 26-27; *House CAP Hearings*, at 78, 88-89, 256.

plan. It clearly does not apply to the selection and negotiation of the plan itself.

Quite aside from its lack of statutory support, the court of appeals' apparent construction is inconsistent both with the Act's purpose and its legislative history. The Navajo Project itself was planned by various investor-owned and public utilities well prior to the enactment of the Act.[9] The non-Federal interests planning the Project needed its electric generation capacity at least 4 to 6 years prior to the earliest date on which energy would be required for the CAP, making the creation of interim power virtually inevitable. Congress was specifically informed, while it was considering the Act, that the utilities involved in the Navajo Project were willing to negotiate with the Secretary for the sale of power.[10] As the eventual terms which might result from these negotiations could not be known, Congress delegated to the Secretary the authority to enter into effective agreements without further Congressional approval.

The Act specified the manner in which the United States was to make payment for any such thermal electric plant entitlement, 43 U.S.C. §§ 1523(b)(1), 1523(b)(4), but otherwise left the Secretary wide discretion in formulating "the most feasible plan for . . . supplying the power requirements of the Central Arizona Project." 43 U.S.C. § 1523(a). There is simply no provision of the Act which precluded the Secretary from agreeing to the interim power disposition as part of his plan, and Congress would hardly have limited the Secretary's freedom to negotiate the power acquisition transaction in the artificial fashion which the court of appeals suggests.

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[9] *Cf., e.g., Senate CAP Hearings*, at 144-46; *House CAP Hearings* at 287.

[10] *Cf., Senate CAP Hearings*, at 142; *House CAP Hearings*, at 256.

B. *The Secretary's determination of the most feasible plan for acquiring CAP power needs is clearly a decision committed to agency discretion by law.*

As noted earlier, the question of whether judicial review of the Secretary's actions is reviewable must be answered with reference to the actual mandate which the Secretary received from the Congress, and not by discerning artificial limits on that mandate from a statute which is cast in the broadest possible terms. The mandate to the Secretary is contained in the statutory direction that he develop and recommend "the most feasible plan" for satisfying CAP power requirements. 43 U.S.C. 1523(a). Judicial review must be had, if at all, on the terms of the task which the statute directed the Secretary to fulfill.

In deciding the reviewability issue, the court of appeals purported to apply the standard, enunciated by this Court in *Citizens to Preserve Overton Park v. Volpe, supra,* that the "committed to agency discretion" exemption from judicial review is limited to those instances "where statutes are drawn in such broad terms that in a given case there is no law to apply." 401 U.S. at 410. Straightforward application of this standard in the present case reveals that the determination in question is clearly one committed to agency discretion, and not subject to judicial review!!

The court of appeals itself recognized that the statutory direction that the Secretary develop the "most feasible plan" for CAP power "would seem to endow him with almost unlimited authority in orchestrating all phases of the project." (App. A, *infra,* p. 29). In the context of this case, there are simply no statutory or judicial standards by which a reviewing court could determine whether the Secretary abused his discretion in determining that extension of the preference to the interim power would not have produced the most feasible plan for the acquisition of CAP energy requirements, given the many facets of the problem and the very limited period of time in which the Secretary was required to act and to report to the Congress.

In the final analysis, the availability of judicial review must turn upon the presence or absence of some statutory standard that will "afford a reviewing court a practicable standard for determining the legality of the . . . ultimate decision . . ." *East Oakland-Fruitvale Planning Council v. Rumsfeld*, 471 F.2d 524, 533 (9th Cir. 1972). The court of appeals found such a standard only by divining a statutory requirement that a single administrative decision be segregated into metaphysical components. Neither *Overton Park* nor any presumption in favor of judicial review validates the disregard of express statutory provisions or the mischaracterization of administrative decisions which are the sole bases for the result reached by the court of appeals in this case. The "law to apply" contemplated by *Overton Park*, *supra*, must derive from Congressional, not judicial legislation.

The Congressional mandate to the Secretary was to develop and implement the "most feasible plan" for securing CAP power requirements. It requires no extended discussion to perceive that the considerations which bear upon the "feasibility" of one plan as opposed to another are "matters on which experts may disagree; they involve[d] nice issues of judgment and choice which require[d] the exercise of informed discretion." *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309, 317-18 (1958). The Secretary's decision in this regard is clearly one "committed to agency discretion by law", 5 U.S.C. § 701(a)(2).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

SNELL & WILMER

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74-1167
74-1168
74-1173

OPINION

ARIZONA POWER POOLING ASSOCIATION,
an Arizona Corporation

Plaintiff-Appellant

ARIZONA POWER AUTHORITY, an agency of
the State of Arizona

INTERMOUNTAIN CONSUMER POWER ASSOCIATION
a Utah Corporation
and
BOUNTIFUL, UTAH, a municipal corporation
Intervenors

vs.

ROGERS C. B. MORTON, individually and as
SECRETARY OF THE INTERIOR OF THE UNITED STATES
and
ELLIS L. ARMSTRONG, individually and as
COMMISSIONER OF THE BUREAU OF RECLAMATION,
DEPARTMENT OF THE INTERIOR

ARIZONA PUBLIC SERVICE COMPANY
TUCSON GAS AND ELECTRIC COMPANY
NEVADA POWER COMPANY
and
SOUTHERN CALIFORNIA EDISON COMPANY

Defendants-Appellees

Appeal from the United States District Court
for the District of Arizona

(September 24, 1975)

Before TUTTLE*, KOELSCH and BROWNING, Circuit Judges:
TUTTLE, Circuit Judge:

*Senior Circuit Judge Fifth Circuit Court of Appeals, sitting by designation.

This is an appeal from an order of the district court granting the government's motion for summary judgment and dismissing with prejudice an action which sought for the plaintiffs a preference right to bid for federally owned electric power. Appellant,[1] a non-profit Arizona corporation comprised of consumer-owned utilities (the "Association"),[2] brought suit in federal district court[3] to compel the Secretary of the Interior to negotiate with it for the purchase and sale of certain thermal power to which the government is entitled by virtue of its participation in the construction and operation of a thermal power plant in Arizona constituting part of the Colorado River Basin Project. The Association alleged that the Secretary had violated a duty imposed on him by federal reclamation laws requiring preference to be given to entities such as itself in the sale of federally-owned electric power. Also named as defendants were those private investor-owned utility companies with which the Secretary had contracted to sell the power at issue. The district court granted summary judgment for defendants, holding that the Secretary's decision with respect to which entities were to be allowed an opportunity to purchase thermal power was not judicially reviewable, and that Congress had approved any possible violation of the preference provision by accepting the Secretary's plan for the Central Arizona Project as submitted, and appropriating funds for its implementation.

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[1] The district court granted leave to intervene as plaintiffs to the Arizona Power Authority, a state agency, Intermountain Consumer Power Association, a Utah corporation, and Bountiful, Utah, a municipal corporation. In addition, *amici curiae* briefs have been filed on appellant's and intervenors' behalf by Anaheim, Riverside, and Banning, California, municipalities which are currently involved in similar litigation in district court in the District of Columbia.

[2] Appellant's members are the Arizona Electric Power Cooperative; Electrical District Number Two, Pinal County, Arizona; and the City of Mesa, Arizona.

[3] The suit was originally filed in the District of Columbia but was later transferred to federal district court in Arizona.

We are unable to agree with the district court's decision, and consequently must reverse. First, we hold that the preference clause does apply to the sales of interim thermal power at issue, and that merely by appropriating funds for the Central Arizona Project, Congress cannot be deemed to have authorized any contravention of the preference clause so as to render the Secretary's actions unreviewable. Furthermore, we find that the Secretary's decision regarding which entities would be allowed to purchase interim power from the project was not one "committed to agency discretion" within the meaning of the Administrative Procedure Act, and was therefore judicially reviewable.

I. FACTUAL BACKGROUND

The Colorado River Basin Project Act, 43 U.S.C. §§ 1501 *et seq.*, was passed by Congress in 1968 to develop the water resources of the Colorado River Basin. One of the Act's central components was the Central Arizona Project (CAP), 43 U.S.C. §§ 1521-28, which was designed to furnish irrigation and municipal water to water-deficient areas of Arizona and western New Mexico. To accomplish the objective of obtaining energy to lift water from the Colorado River to the level needed for irrigation, § 1523(a) authorized and directed the Secretary of the Interior:

> "to continue to a conclusion appropriate engineering and economic studies and to recommend the most feasible plan for the construction and operation of hydroelectric generating and transmission facilities, the purchase of electrical energy, the purchase of entitlement to electrical plant capacity, or any combination thereof, including participation, operation, or construction by non-federal entities, for the purpose of supplying the power requirements of the Central Arizona Project and augmenting the Lower Colorado River Basin Development Fund: ***Provided,*** That nothing in this section or in this Act contained shall be construed to authorize the study or construction of any dams on the main stream of the Colorado River between Hoover Dam and Glen Canyon Dam." 43 U.S.C. § 1523(a).

The final proviso in this section was a result of conservationist opposition to additional dam sites along the river, and its inclusion virtually precluded the possibility of obtaining the needed energy from hydroelectric sources. Section 1523(b) was consequently added to permit the Secretary to obtain energy through agreements pertaining to thermal power sources, and to dispose of such energy when it was not needed for the CAP:

> "(b) If included as a part of the recommended plan, the Secretary may enter into agreements with non-federal interests proposing to construct thermal generating powerplants whereby the United States shall acquire the right to such portions of their capacity, including delivery of power and energy over appurtenant transmission facilities to mutually agreed upon delivery points, as he determines is required in connection with the operation of the Central Arizona Project. When not required for the Central Arizona Project, the power and energy acquired by such agreements may be disposed of intermittently by the Secretary for other purposes at such prices as he may determine, including its marketing in conjunction with the sale of power and energy from Federal powerplants in the Colorado River system so as to produce the greatest practicable amount of power and energy that can be sold at firm power and energy rates ...." 43 U.S.C. § 1523(b).

Pursuant to this statutory authorization, the Secretary entered into an agreement with certain public and private interests which were building a thermal generating power plant near Page, Arizona, known as the Navajo plant. The non-federal participants were the Salt River Project, the Los Angeles Department of Water and Power, the Arizona Public Service Company, Nevada Power Company, and Tucson Gas & Electric Company. By virtue of its participation in the construction of the Navajo project, the Bureau of Reclamation was to obtain an entitlement of 24.3% (561 megawatts) of the plant's power output, which would eventually be utilized for CAP purposes.

The Navajo plant, however, was scheduled to begin operation around 1974, whereas the CAP would not be operational, and hence would have no need of any of the Navajo power, until nearly 1980. Consequently, there existed a considerable amount of "interim power" available from the Navajo project which the Secretary was authorized to market under § 1523(b).

In seeking to dispose of this interim power, it is undisputed that the Secretary refused to offer the Association the opportunity to become a purchaser, and contracted instead with those public and private interests involved in the construction of the thermal plant, together with Southern California Edison, another private investor-owned utility company.[4] The Secretary's choice of entities to which he offered the opportunity to purchase power was made despite a general provision in the Colorado River Basin Project Act, 43 U.S.C. § 1554, which states that "[e]xcept as otherwise provided in this Act, in constructing, operating, and maintaining the units of the projects herein and hereafter authorized, the Secretary shall be governed by the Federal reclamation laws [citations omitted] to which laws this Act shall be deemed a supplement." The Federal Reclamation Project Act of 1939 contains a preference clause applying to any sale of electric power or lease of power privileges by the United States:

> "*Provided further*, That in said sales or leases preference shall be given to municipalities and other public corporations or agencies; and also to cooperatives and other nonprofit organizations financed in whole or in part by

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[4] The Secretary contracted for disposition of its entitlement of 561 megawatts of interim power as follows:

Salt River Project	110 megawatts
City of Los Angeles	75 megawatts
Arizona Public Service Company	17 megawatts
Tucson Gas & Electric	9 megawatts
Nevada Power Company	14 megawatts
Southern California Edison	336 megawatts
	561 megawatts

The last four entities do not qualify as preference customers under federal reclamation laws.

> loans made pursuant to the Rural Electrification Act of 1936. . . . No contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficieny of the project for irrigation purposes." 43 U.S.C. § 485h(c).

It is upon this provision and its incorporation into the Colorado River Basin Project Act by virtue of 43 U.S.C. § 1554 that appellant and intervenors, all of whom qualify as preference customers, base their claim that the Secretary violated his statutory duty by contracting to sell the interim power to the privately-owned utility companies without first offering the Association the opportunity to purchase it.

On September 30, 1969, pursuant to statutory requirement,[5] the Secretary submitted his recommended plan for obtaining energy for the CAP to Congress in a letter which outlined in detail the contractual arrangements involved in actually securing the thermal power necessary for the CAP. The only reference made to the existence and disposition of interim power, however, was a statement that Southern California Edison Company would be involved "as a purchaser of a major portion of United States entitlement to generation and transmission prior to need for Central Arizona Project pumping."[6] Congress approved the Secretary's plan as submitted, and has since continued to appropriate funds for the development of the CAP.[7]

In moving for summary judgment, defendants below made three arguments: first, that it was clear from the legislative history of the Colorado River Basin Project Act, as well as from the history of federal preference policy, that Congress never intended the preference clause to apply to the government's entitlement to thermal energy from the Navajo project; second, that even if the

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[5] 43 U.S.C. § 1523(c).

[6] Letter from James R. Smith, Assistant Secretary of the Interior, to the President of the Senate, September 30, 1969.

[7] Act of December 11, 1969, P.L. 91-144, 83 Stat. 330; Act of October 7, 1970, P.L. 91-439, 84 Stat. 897.

preference clause were found to be applicable, the development by the Secretary of the most feasible plan for securing and disposing of the power at issue was a decision "committed to agency discretion" and not judicially reviewable under the Administrative Procedure Act, 5 U.S.C. §§ 500 *et seq.;* and finally, that congressional approval of the plan as submitted had the force of law, thereby rendering judicial review unavailable. On the basis of defendants' second and third arguments, the district court granted their motion for summary judgment, holding that "Congress clearly committed the determination of the most feasible plan to the Secretary's discretion subject to congressional approval which was given repeatedly."

Upon careful consideration of each of the issues involved, however, it appears that the district court erred in its decision, and for the reasons stated below we hereby reverse and remand the case for further proceedings.

II. APPLICABILITY OF THE PREFERENCE CLAUSE TO FEDERAL SALES OF THERMAL POWER

Both of the grounds upon which the district court granted summary judgment for the defendants were based upon an assumption, but not upon an actual finding, that the preference clause applied to governmental sales of thermally-generated electric power. This threshold issue of the preference provision's applicability, while argued by both sides below, was never expressly decided by the district court. However, it presents only an issue of law which, for the sake of judicial economy, we dispose of on this appeal.

Defendants below made two main arguments against the applicability of the preference clause to the sales of interim power at issue here: first, that the legislative history of the Colorado River Basin Project Act clearly showed that Congress never intended for the preference provision to apply to sales of federally-owned thermal electric power, since the preference clause had never before been applied to sales of anything other than hydroelectric power. Second, defendants below argued that the phrase

"surplus power" as used in the Act meant power in excess of the government's needs for the Central Arizona Project, once the CAP plant commenced operations around 1980, but did not include in its definition power to which the government was entitled in the interim between completion of the thermal power plant and the time such power would be needed for irrigation purposes. Both of these arguments seem somewhat contrived in light of the clear language of the Act, and consequently we reject them. The preference clause has previously been applicable only in the context of sales of federally-owned hydroelectric power because prior to the Colorado River Basin Project Act the government had never been authorized to obtain rights to thermally-generated electric power. In drafting the CAP portion of the Act, however, Congress authorized federal participation in thermal electric projects, and clearly made all sales of any excess (including interim) power from such a project subject to federal reclamation laws, including the preference clause. To read the statute otherwise would be to do violence to its plain meaning.

III. CONGRESSIONAL APPROVAL OF ANY VIOLATION OF THE PREFERENCE PROVISION

In its opinion, the district court relied heavily on the argument advanced by defendants below that by virtue of its annual appropriations for the Central Arizona Project Congress effectively "approved" the disposition of interim power to non-preference customers and thus sanctioned any possible violation of the preference clause, rendering the issue unreviewable by the courts. Cf. Environmental Defense Fund v. Corps of Engineers, 492 F.2d 1123, 1140 (5 Cir. 1974). We cannot agree with this conclusion. Although it is undisputed that in passing the appropriation acts, Congress had before it various committee reports listing the six public and private entities which were to be involved as purchasers of interim power from the Navajo project, this fact in and of itself does not justify the inference of congressional approval of purchase negotiations that were allegedly conducted in violation of the preference clause. It is not the ultimate sale of the interim power to private interests which is alleged to be a viola-

tion of the preference clause, but rather the undisputed refusal of the federal appellees to offer appellant the opportunity to purchase the power prior to offering it to the private utility companies named as defendants below. There is nothing in the record to indicate that Congress was ever informed during any of the appropriation hearings, or by any of the reports submitted to it,[8] that the Association and other potential preference customers had sought, and had been refused, the chance to participate in the purchase of the government's entitlement to interim thermal power from the Navajo project.

Knowledge of the precise course of action alleged to have been acquiesced in is an essential prerequisite to a finding of ratification, cf. United States v. Beebe, 180 U.S. 343, 354 (1901); United States v. Georgia-Pacific Company, 421 F.2d 92, 102 n.8 (9 Cir. 1970), and the record before us does not support a finding of congressional knowledge of the course of sales negotiations for the interim Navajo project power sufficient to equate passage of the appropriation acts with ratification of the Secretary's actions in conducting those negotiations. It is thus clear that the district court erred in holding that by appropriating funds for the CAP Congress ratified any possible violation of the preference clause committed by the Secretary in the power sales negotiations and barred judicial review of his decision.

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[8] Two sentences in the Secretary's 1969 report to Congress mentioned that "other parties" and the City of Anaheim, California and the Arizona Power Authority had an interest, but the report failed to specify the nature of that interest or that preference customers had been denied the right to bid. Letter from James R. Smith, Assistant Secretary of the Interior, *supra* note 6.

IV. REVIEWABILITY OF THE SECRETARY'S ACTIONS UNDER THE APA

Appellees also advanced the argument, which was accepted by the district court, that, even assuming the applicability of the preference clause, in devising the "most feasible plan" for obtaining electric power for the Central Arizona Project the Secretary had discretion so wide-ranging as to be free from judicial scrutiny under the Administrative Procedure Act, 5 U.S.C. § 701. The government sales of Navajo power, contended the appellees, were an integral part of this "most feasible plan" and hence governed only by the Secretary's judgment. For support they point to 43 U.S.C. § 1523(a) instructing the Secretary to devise the "most feasible plan" and to the language of the preference clause itself, which states:

> "... in said sales or leases preference shall be given to municipalities and other public corporations or agencies. ... *No contract relating to ... electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes.*" 43 U.S.C. § 485h(c) (emphasis added).

This language, appellees contend, makes the availability of the preference dependent upon a discretionary determination by the Secretary as to the effect on project efficiency – a judgment so discretionary, they argue, as not to be subject to judicial review under the Administrative Procedure Act.

Careful examination of the statutes at issue and the case law in this area compels us to disagree with this argument.

The Administrative Procedure Act grants a right of judicial review to any person adversely affected or injured by agency action, 5 U.S.C. § 702, and provides that the judicial review provisions are applicable except in two particular situations: where a statute itself expressly precludes judicial review, or where "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a). Since none of the statutes involved here expressly prohibits judicial review of the agency action at issue, the crucial question becomes whether the Secretary's decision with

respect to the interim power sale negotiations was "committed to agency discretion by law" within the meaning of §701(a)(2). In undertaking this inquiry we must bear in mind that judicial reviewability of administrative action is the rule, and nonreviewability an exception which must be demonstrated, and which should result only from a showing of "clear and convincing evidence" of a legislative intent to restrict judicial review. Barlow v. Collins, 397 U.S. 159, 166 (1969); Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967). As stated by the Supreme Court in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), the "committed to agency discretion" exception is a very narrow one[9] which is applicable only in "those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." 401 U.S. at 410.

The language of 43 U.S.C. §§ 1523(a) and (b) authorizing the Secretary to devise "the most feasible plan" for obtaining pumping power for the Central Arizona Project would seem to endow him with almost unlimited authority in orchestrating all phases of the project. By inserting § 1554 into the text of the Colorado River Basin Project Act, however, Congress circumscribed that discretion in at least one area by making his actions subject to the federal reclamation laws. Since we have determined (see Part II infra) that the preference clause *is* applicable to the power sales at issue here, we must examine its language to determine what degree of freedom the Secretary has in any given situation in deciding whether it must be applied.

The text of the preference provision is couched in mandatory terms, stating that "preference *shall* be given" (emphasis added) to certain public entities in governmental sales or leases of electric power or power privileges. The section, however, concludes

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[9] The scope of this exception has been the subject of wide-ranging commentary and dispute. See, e.g., Berger, Administrative Arbitrariness: A Synthesis, 78 Yale L.J. 965 (1969); Saferstein, Nonreviewability: A Functional Analysis of "Committed to Agency Discretion", 82 Harv. L. Rev. 367 (1968); Davis, Administrative Arbitrariness is Not Always Reviewable, 51 Minn.L.Rev. 643 (1967).

with a proviso that no sales contracts shall be made unless, "in the judgment of the Secretary", they will not impair the efficiency of the project *for irrigation purposes*. Reading these two sentences together, it is clear that in marketing the interim power at issue the Secretary does not have unfettered discretion as argued by defendants below. The preference clause clearly calls for the Secretary to defer to the stated congressional objective of offering the government's excess power allotment to public entities first, subject only to considerations of overall project efficiency with respect to the ultimate goals of irrigation. The Secretary is thus given a very specific directive and a prohibition against making *any* contract, regardless of the public or private status of the other contracting entity, which would "impair project efficiency". Clearly he is *not* given total and absolute discretion as to whether or not to apply the preference clause in any given situation, regardless of the circumstances. Thus, given the preference clause's applicability to these interim power sales, there is "law to apply" clearly evident on the face of the statute itself, and hence the exception appellees seek to invoke is unavailable. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971); East Oakland-Fruitvale Planning Council v. Rumsfeld, 471 F.2d 524, 533-36 (9th Cir. 1972). By considering the complaint on the grounds discussed it is clear that the trial court did not review the legality and propriety of the Secretary's decision not to offer appellant the opportunity to purchase the interim power, under the guidelines and directives of congressional preference for "public" purchases as limited by considerations of possible impairment of project efficiency as set out in § 485h(c). Overton Park, *supra*, at 415-417. For example, defendants-appellees contend that as part of the "most feasible plan" the Secretary determined that interim power should be sold only to those with an adequate back-up generating capacity and with an alternative means of transmitting energy. They argue that these requirements were necessary to avoid the possibility of cascading outages and equipment damage. On remand the district court will be required to determine whether the Secretary abused the limitations on his discretion by deciding that, because

of these considerations, a disposition of the interim power to appellant and other excluded preference customers would have impaired the efficiency of the Central Arizona Project for irrigation purposes.

For the reasons stated above, the judgment of the district court is reversed and the case remanded for further proceedings not inconsistent with this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ARIZONA POWER POOLING ASSOCIATION
Plaintiff-Appellant,
ARIZONA POWER AUTHORITY, et al.,
Intervenors,
vs.
ROGERS C. B. MORTON, et al.,
Defendants-Appellees.

No. 74-1167

ORDER ON PETITION FOR REHEARING

Before: TUTTLE,* KOELSCH and BROWNING, Circuit Judges.

Judges Tuttle, Koelsch and Browning duly considered defendants-appellees' Petition for Rehearing and concluded to supplement the opinion with the per curiam opinion attached hereto; and thereupon voted unanimously to deny the Petition for Rehearing. Judges Koelsch and Browning further voted, and Judge Tuttle recommended, against a rehearing in banc.

The full court having been so advised and no judge of the court in active service having requested a vote on the suggestion for rehearing in banc, the Petition for Rehearing is denied, and the suggestion for rehearing in banc is rejected.

*The Honorable Elbert P. Tuttle, United States Circuit Judge for the Fifth Circuit, sitting by designation.

APPENDIX C
IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74-1167

ARIZONA POWER POOLING ASSOCIATION,
Plaintiff-Appellant,
ARIZONA POWER AUTHORITY, et al.,
Intervenors,
vs.
ROGERS C.B. MORTON, et al.,
Defendants-Appellees.

On Petition for Rehearing and Suggestion of Appropriateness of Rehearing En Banc of Arizona Public Service Company, Tucson Gas and Electric Company, Nevada Power Company, and Southern California Edison Company;

On Petition for Rehearing or Modification of Federal Appellees.

[December 17, 1975]

Before TUTTLE*, KOELSCH, and BROWNING, Circuit Judges:

PER CURIAM:

We consider it appropriate to make this modification to our opinion previously published in this case. We must, of course, consider this appeal in the posture in which it stands, which is an appeal from a summary judgment for the defendants, granted by the trial court on stated legal grounds.

*Honorable Elbert P. Tuttle, United States Circuit Judge, Fifth Circuit, sitting by designation.

In considering it we also take note of the issues posed by the parties in their respective briefs.

When we stated in the opinion that "it is undisputed that the Secretary refused to offer the Association the opportunity to become a purchaser," we probably should have stated "on a motion for summary judgment we accept as true all allegations of fact pleaded by the party against whom the judgment is sought; therefore, we must accept as true the claim of the plaintiffs that the Secretary refused to offer the Association the opportunity to become a purchaser."

Turning next to the issues that are presented on appeal, we note that the United States defendants urged only two bases for the granting of summary judgment. These two were contained in one paragraph entitled 'Summary of Argument:'

> "The interim power which is the subject of this action was part of the initial acquisition of electric energy for the Navaho Project, and as such the disposition of this interim power was both committed to agency discretion and approved by Congress and thus not judicially cognizable."

In granting this motion the trial court adopted the Government's grounds and argument. The Secretary argued that the provisions of 43 U.S.C. § 1523(a)[1] when coupled with § 1523(b)[2] gave wide-open discretion to the Secretary to consider as a part of the "most feasible plan" for acquisition any plan "to dispose" of unneeded power.

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[1] This section directed the Secretary "to recommend the most feasible plan for the construction and operation of hydroelectric generating and transmission facilities, the purchase of electrical energy, the purchase of entitlement to electrical plant capacity . . . for the purpose of supplying the power requirements of the Central Arizona Project."

[2] This section provides that ". . . when not required for the Central Arizona Project the power and energy acquired by such agreements may be disposed of intermittently by the Secretary for other purposes at such prices as he may determine . . ."

The Government then said that since the disposition of excess or lay-off power was part of "the most feasible plan" whose confection was confided to the Secretary, this official's determination to dispose of the power without giving consideration to the preference customers was a discretionary act, and thus not reviewable.

The trial court accepted this argument, together with the argument that the plan had been approved by Congress through the passage of appropriation acts, the other part of the Government's argument.

The correctness of the trial court's action is therefore what, and all, that is before us.

We hold that the direction to the Secretary to recommend "the most feasible plan" for acquiring power does not comprehend the right to sell excess power in a manner that is in conflict with the reclamation acts even though the Secretary may seek to denominate such sales as part of "the most feasible plan" which he has otherwise authority to put into effect.

For the reasons which we have already stated we hold that the disposition of excess power is subject to the restrictions 43 U.S.C. § 485h(c).[3]

Further, as we have stated in the opinion, we hold that there has been no modification or repeal of the preference statute as to this project by the enactment of Congress of subsequent appropriation acts.

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[3] This section provides: ". . . in said sales or leases preference shall be given to municipalities and other public corporations or agencies . . . . No contract relating to . . . electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes."

Thus, we conclude that the trial court erred in its holding that the action of the Secretary was not reviewable for the reasons stated both in its opinion and the reasons advanced by the Government, the movant for the summary judgment.

Moreover, the United States defendants in their brief supporting the trial court's judgment again stated their argument in similar terms:

"I.

The Secretary of the Interior in 'the most feasible plan' submitted to Congress, properly exercised his discretion in offering the opportunity to purchase the Government's interim power entitlement only to those utilities which had adequate back-up capacity and transmission facilities.

II.

Congress knowingly and repeatedly approved the Secretary's interpretation and administration of the Colorado River Basin Project Act in offering the Government's interim power entitlement to private as well as to preference utilities."

It would seem, therefore, that neither the trial court nor this court has had presented to it a record which would permit it to decide anything more than the issues which we have outlined. As to these issues, we have concluded that the preference clause applies to the disposition of power from this thermal power plant notwithstanding the Government's contention that such disposition of excess power was part of the plan in the formation of which the Secretary was given broad discretion. This discretion was limited by the affirmative requirements that any such sale must be made under the limitations contained in the reclamation acts. Since we hold that the Secretary had no discretion to ignore the limitations of this act, the actions of the Secretary are thus not denied reviewability under the "discretionary act exception."

As noted in the opinion, the preference provisions in themselves contain a grant of discretion to the Secretary. This is contained in the sentence "no contract relating to electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes." 43 U.S.C. § 485h(c).

The record before us does not disclose, and the parties here to not contend, that the Secretary ever exercised his judgment with respect to this grant of discretion. This phase of the controversy is discussed only under the argument that the Secretary's power to make contracts for the sale of power was included within his power to recommend "the most feasible plan" for the acquisition of power, a matter which we have already disposed of.

It is clear that under the terms of the preference clause neither the plaintiffs nor any other preference customer has an automatic entitlement to the excess power that will be available for disposition by the Secretary. We act only upon the record that is now before us, and in that posture of affairs we must accept as true the plaintiffs' allegations that as preference customers they have had no opportunity to compete for this surplus power. That allegation is denied by what amounts to a general denial in the answers filed by the defendants. Thus the issue remains open before the trial court, as do any other issues which have not been disposed of by what has now been said in this opinion as modified.

THE JUDGMENT IS REVERSED AND THE CASE IS REMANDED TO THE TRIAL COURT FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

ARIZONA POWER POOLING ASSOCIATION, an Arizona corporation,
Plaintiff,
ARIZONA POWER AUTHORITY, an agency of the State of Arizona, INTERMOUNTAIN CONSUMER POWER ASSOCIATION, a Utah corporation, and BOUNTIFUL, UTAH, a municipal corporation of the State of Utah,
Intervenors,
vs.
ROGERS C. B. MORTON, individually and as Secretary of the Interior of the United States, ELLIS L. ARMSTRONG, individually and as Commissioner of the Bureau of Reclamation, Department of the Interior, ARIZONA PUBLIC SERVICE COMPANY, a corporation, TUCSON GAS AND ELECTRIC COMPANY, a corporation, NEVADA POWER COMPANY, a corporation, and SOUTHERN CALIFORNIA EDISON COMPANY, a corporation,
Defendants.

No. Civ. 72-125 Pct. WPC

MEMORANDUM AND ORDER

The non-government defendants have filed motions to dismiss the complaint and for judgment on the pleadings. The government defendants have filed a motion for summary judgment. Memoranda have been filed by all parties and oral argument heard.

Section 303(a) of Public Law 90-537, 43 U.S.C. § 1523(a), directed the Secretary of Interior to recommend to Congress by September 30, 1969, "... the most feasible plan ... for the purpose of supplying the power requirements of the Central Arizona

Project and augmenting the Lower Colorado River Basin Development Fund: . . . ."

On September 30, 1969, the Secretary submitted his recommended plan to Congress. As a part of the total negotiated package the plan provided for resale by the United States of its entitlement to power purchased from thermal generating plants being built by a consortium of both "preference" and "non-preference" entities during the period prior to need for power by the Central Arizona Project (hereinafter called interim power). Four of the interim power customers are members of the consortium constructing and owning the general facilities, two being preference entities and two being non-preference. The fifth, Southern California Edison Company, is involved in the furnishing of transmission and switchyard facilities needed for at least some period by the government. It is clear that the overall plan submitted by the Secretary involved negotiations on the basis of availability and sale of the interim power as consideration to all or part of the parties necessarily involved in that "most feasible plan."

Section 303(c) of Public Law 90-537, 43 U.S.C. § 1523(c), provides in part: "Except as authorized by subsection (b) of this section, such plan shall not become effective until approved by the Congress." That subsection permitted the Secretary ". . . if included as part of the recommended plan . . ." to contract for purchase of thermal power and further "When not required for the Central Arizona Project, the power and energy acquired by such agreements may be disposed of intermittently by the Secretary for other purposes at such prices as he may determine. . . ."

The plan submitted to Congress specifically provided "The Southern California Edison Company will, however, be involved as a purchaser of a major portion of United States entitlement to generation and transmission prior to need for Central Arizona

Project pumping." The Southern California Edison Company is a non-preference entity. See Section 9(c) of the Reclamation Project Act of 1939; 43 U.S.C. § 485h(c).

This plan was thereafter approved by Congress without change as a result of successive annual implementing appropriations. Public Laws 91-144, 92-405 and 93-97.

Plaintiff and intervenors, all preference entities, applied for allocation of interim power when they learned of its possible availability and complain of that portion of the plan which provides for interim sale to no-preference customers. They received no allocation of the power being sold prior to its being needed for operation of the Central Arizona Project. They base their claim on section 604 of Public Law 90-537, 43 U.S.C. § 1554: "Except as otherwise provided in this Act, in constructing, operating, and maintaining the units of the projects herein and hereafter authorized, the Secretary shall be governed by the Federal Reclamation laws (Act of June 17, 1902; 32 Stat. 388, and Acts amendatory thereto) to which laws this Act shall be deemed a supplement." It is their contention that this section binds the Secretary to recognize the preference provisions of the Reclamation Act of 1939, 43 U.S.C. § 485h(c), in the disposition of the interim power in question.

Among other arguments, defendants claim that the development of the most feasible plan for securing power was a matter committed to agency discretion and not reviewable here, *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309, 317-18 (1958); *Butz v. Glover Livestock*, 93 S.Ct. 2746 (1973); 5 U.S.C. § 701 (a)(2); and further that approval of the plan by Congress as submitted has the force of law.

The legislative history of Public Law 90-537 prior to its passage was extensively argued by both sides but is ambiguous and of no real assistance. However, the various Acts of Congress appropriating funds for the Secretary's recommended plan and the record of hearings thereon by subcommittees of both houses fully support both the arguments above mentioned of defen-

dants. See the government's supplemental response and attachments thereto filed herein on October 15, 1973. While the Secretary's report of September 30, 1969, in describing the plan referred only to the interim power sale to Southern California Edison, the discussions of that plan before the appropriation committees detailed each customer and amount of its entitlement. With the committee reports before it the full Congress by three separate enactments provided funds to implement the Secretary's plan. It appears that Congress clearly committed the determination of the most feasible plan to the Secretary's discretion subject to congressional approval which was given repeatedly. The remaining arguments of defendants need not be considered.

The holding of the Court herein relates only to the sale of interim power as part of the Secretary's recommended "most feasible plan" for obtaining power for the future operation of the Central Arizona Project.

IT IS ORDERED:

The defendants' motion for summary judgment is granted and the Clerk will enter judgment dismissing the complaint and action herein as to all defendants with prejudice.

DATED October 23, 1973.

United States District Judge

APPENDIX E

THE RECLAMATION PROJECT ACT OF 1939

43 U.S.C. § 485 h (c). Furnishing water to municipalities; sale of electric power; lease of power privileges.

The Secretary is authorized to enter into contracts to furnish water for municipal water supply or miscellaneous purposes: *Provided*, That any such contract either (1) shall require repayment to the United States, over a period of not to exceed forty years from the year in which water is first delivered for the use of the contracting party, with interest not exceeding the rate of 3½ per centum per annum if the Secretary determines an interest charge to be proper, of an appropriate share as determined by the Secretary of that part of the construction costs allocated by him to municipal water supply or other miscellaneous purposes; or (2) shall be for such periods, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, and shall require the payment of said rates each year in advance of delivery of water for said year. Any sale of electric power or lease of power privileges, made by the Secretary in connection with the operation of any project or division of a project, shall be for such periods, not to exceed forty years, and at such rates as in his judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the construction investment at not less than 3 per centum per annum, and such other fixed charges as the Secretary deems proper: *Provided further*, That in said sales or leases preference shall be given to municipalities and other public corporations or agencies; and also to cooperatives and other nonprofit organizations financed in whole or in part by loans made pursuant to the Rural Electrification Act of 1936. Nothing in this subsection shall be applicable to provisions in existing contracts, made pursuant to law, for the use of power and miscellaneous revenues of a project for the benefit of users of

water from such project. The provisions of this subsection respecting the terms of sales of electric power and leases of power privileges shall be in addition and alternative to any authority in existing laws relating to particular projects. No contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes.

* * * * *

THE COLORADO RIVER BASIN PROJECT ACT OF 1968

43 U.S.C. § 1501. Congressional declaration of purpose and policy.

(a) It is the object of this Act to provide a program for the further comprehensive development of the water resources of the Colorado River Basin and for the provision of additional and adequate water supplies for use in the upper as well as in the lower Colorado River Basin. This program is declared to be for the purposes, among others, of regulating the flow of the Colorado River; controlling floods; improving navigation; providing for the storage and delivery of the waters of the Colorado River for reclamation of lands, including supplemental water supplies, and for municipal, industrial, and other beneficial purposes; improving water quality; providing for basic public outdoor recreation facilities; improving conditions for fish and wildlife, and the generation and sale of electrical power as an incident of the foregoing purposes.

(b) It is the policy of the Congress that the Secretary of the Interior (hereinafter referred to the "Secretary") shall continue to develop, after consultation with affected States and appropriate Federal agencies, a regional water plan, consistent with the provisions of this Act and with future authorizations, to serve as the framework under which projects in the Colorado River Basin may be coordinated and constructed with proper timing to the

end that an adequate supply of water may be made available for such projects, whether heretofore, herein, or hereafter authorized.

43 U.S.C. § 1521. Central Arizona Project.

(a) Construction and operation; Granite Reef aqueduct and pumping plants; Orme Dam and Reservoir; Buttes Dam and Reservoir; Hooker Dam and Reservoir; Charleston Dam and Reservoir; Tucson aqueducts and pumping plants; Salt-Gila aqueducts; related and appurtenant works.

For the purposes of furnishing irrigation water and municipal water supplies to the water-deficient areas of Arizona and western New Mexico through direct diversion or exchange of water, control of floods, conservation and development of fish and wildlife resources, enhancement of recreation opportunities, and for other purposes, the Secretary shall construct, operate, and maintain the Central Arizona Project, consisting of the following principal works: (1) a system of main conducts and canals, including a main canal and pumping plants (Granite Reef aqueduct and pumping plants), for diverting and carrying water from Lake Havasu to Orme Dam or suitable alternative, which system may have a capacity of 3,000 cubic feet per second or whatever lesser capacity is found to be feasible: *Provided*, That any capacity in the Granite Reef aqueduct in excess of 2,500 cubic feet per second shall be utilized for the conveyance of Colorado River water only when Lake Powell is full or releases of water are made from Lake Powell to prevent the reservoir from exceeding elevation 3,700 feet above mean sea level or when releases are made pursuant to the proviso in section 1552(a)(3) of this title: *Provided further*, That the costs of providing any capacity in excess of 2,500 cubic feet per second shall be repaid by those funds available to Arizona pursuant to the provision of section 1543(f) of this title, or by funds from sources other than the development fund; (2) Orme Dam and Reservoir and power-pumping plant or suitable alternative; (3) Buttes Dam and Reservoir, which shall be so operated as not to prejudice the rights of any user in and to the waters of the Gila River as those rights are set forth in the decree entered by the United States District Court for the District of

Arizona on June 29, 1935, in United States against Gila Valley Irrigation District and others (Globe Equity Numbered 59); (4) Hooker Dam and Reservoir or suitable alternative, which shall be constructed in such a manner as to give effect to the provisions of subsection (f) of section 1524 of this title; (5) Charleston Dam and Reservoir; (6) Tucson aqueducts and pumping plants; (7) Salt-Gila aqueducts; (8) related canals, regulating facilities, hydroelectric powerplants, and electric transmission facilities required for the operation of said principal works; (9) related water distribution and drainage works; and (10) appurtenant works.

43 U.S.C. § 1523. Power requirements of Central Arizona Project and augmentation of Lower Colorado River Basin Development Fund.

(a) Engineering and economic studies.

The Secretary is authorized and directed to continue to a conclusion appropriate engineering and economic studies and to recommend the most feasible plan for the construction and operation of hydroelectric generating and transmission facilities, the purchase of electrical energy, the purchase of entitlement to electrical plant capacity, or any combination thereof, including participation, operation, or construction by non-Federal entities, for the purpose of supplying the power requirements of the Central Arizona Project and augmenting the Lower Colorado River Basin Development Fund: *Provided*, That nothing in this section or in this Act contained shall be construed to authorize the study or construction of any dams on the main stream of the Colorado River between Hoover Dam and Glen Canyon Dam.

(b) Construction of thermal generating powerplants; agreements for acquisition by United States of portions of plant capacity.

If included as a part of the recommended plan, the Secretary may enter into agreements with non-Federal interests proposing to construct thermal generating powerplants whereby the United States shall acquire the right to such portions of their capacity, including delivery of power and energy over appurtenant transmission facilities to mutually agreed upon delivery points, as he determines is required in connection with the operation of the Central Arizona Project. When not required for the Central Arizona Project, the power and energy acquired by such agreements may be disposed of intermittently by the Secretary for other purposes at such prices as he may determine, including its marketing in conjunction with the sale of power and energy from Federal powerplants in the Colorado River system so as to produce the greatest practicable amount of power and energy that can be sold at firm power and energy rates. The agreement shall provide among other things that–

(1) the United States shall pay not more than that portion of the total construction cost, exclusive of interest during construction, of the powerplants, and of any switchyards and transmission facilities serving the United States, as is represented by the ratios of the respective capacities to be provided for the United States therein to the total capacities of such facilities. The Secretary shall make the Federal portion of such costs available to the non-Federal interests during the construction period, including the period of preparation of designs and specifications, in such installments as will facilitate a timely construction schedule, but no funds other than for preconstruction activities shall be made available by the Secretary until he determines that adequate contractual arrangements have been entered into between all the affected parties covering land, water, fuel supplies, power (its availability and use), rights-of-way, transmission facilities and all other necessary matters for the thermal generating powerplants;

(2) annual operation and maintenance costs shall be apportioned between the United States and the non-Federal interests on an equitable basis taking into account the ratios determined in accordance with the foregoing clause (1): *Provided, however,* That the United States shall share on the foregoing basis in the depreciation component of such costs only to the extent of provision for depreciation on replacements financed by the non-Federal interests;

(3) the United States shall be given appropriate credit for any interests in Federal lands administered by the Department of the Interior that are made available for the powerplants and appurtenances;

(4) costs to be borne by the United States under clauses (1) and (2) shall not include (a) interest and interest during construction, (b) financing charges, (c) franchise fees, and (d) such other costs as shall be specified in the agreement.

(c) Recommended plan; submission to Congress.

No later than one year from September 30, 1968, the Secretary shall submit his recommended plan to the Congress. Except as authorized by subsection (b) of this section, such plan shall not become effective until approved by the Congress.

43 U.S.C. § 1554. Federal reclamation laws.

Except as otherwise provided in this Act, in constructing, operating, and maintaining the units of the projects herein and hereafter authorized, the Secretary shall be governed by the Federal reclamation laws (Act of June 17, 1902; 32 Stat. 388, and Acts amendatory thereof or supplementary thereto) to which laws this Act shall be deemed a supplement.

* * * *

THE ADMINISTRATIVE PROCEDURE ACT

5 U.S.C. § 701. Application; definitions.

(a) This chapter applies, according to the provisions thereof, except to the extent that–

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No.

ARIZONA PUBLIC SERVICE COMPANY, et al.,
Petitioners,

v.

ARIZONA POWER POOLING ASSOCIATION, an Arizona corporation, et al.

CERTIFICATE OF SERVICE BY MAIL

Daniel J. McAuliffe, being a member of the bar of this Court, hereby certifies:

1. That he is an active member of the bar of this Court and that he is an attorney for petitioners herein, Arizona Public Service Company, Tucson Gas and Electric Company, Nevada Power Company, and Southern California Edison Company.

2. That the Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit submitted herewith has been served upon counsel, in accordance with the provisions of Rule 33 of the Rules of this Court, by placing three copies of the same in the United States mail, first class postage prepaid, properly addressed, this 15th day of January, 1976, to:

William C. Smitherman, Esquire
United States Attorney
230 North First Avenue
Phoenix, Arizona 85003

Michael A. Curtis, Esquire
Suite 1570
First National Bank Plaza
100 West Washington
Phoenix, Arizona 85003

James P. Bartlett, Esquire
830 North First Avenue
Phoenix, Arizona 85003

Donald E. Dickerman, Esquire
Hoesapple, Conner, Jones, McFall, & Johnson
2 East Congress, 4th Floor
Tucson, Arizona 85701

3. That the Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit submitted herewith has been served upon counsel, in accordance with the provisions of Rule 33 of the Rules of this Court, by placing three copies of the same in the United States mail, air mail postage prepaid, properly addressed, this 15th day of January, 1976, to:

Melvin Richter, Esquire
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

George K. Fadel, Esquire
170 West Fourth South
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C. Emerson Duncan, II, Esquire
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Carl Strass, Esquire
Attorney, Appellate Section
Acting Assistant Attorney General
Land and Natural Resources Division
United States Department of Justice
Washington, D.C. 20530

Solicitor General Of The United States
United States Department of Justice
Washington, D.C. 20530

4. That the foregoing represents service on all parties required to be served under the provisions of Rule 33, Rules of the United States Supreme Court.

Daniel J. McAuliffe